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No 80-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Truth-in-Lending Act does not apply to "credit transactions involving extensions of credit for business or commercial purposes," § 104(1), 15 U.S.C. § 1603(1) (1976). Should credit extended for business or commercial purposes become subject to the Act solely because an individual, following customary business practice, may also be liable for the business debt.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner American Express Company ("American Express") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980.

OPINION BELOW

The Opinion and Judgment of The Court of Appeals reversing the District Court's judgment in favor of Petitioner appears in Appendix A to this Petition, and is reported at 615 F.2d 191. The Order of the Court of Appeals denying a Petition for Rehearing en banc appears in Appendix B. The Memorandum Opinion and Order of the District Court appears in Appendix C, and is reported at 444 F. Supp. 334. The Judgment of the District Court appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on April 7, 1980. A timely petition for rehearing en banc was denied on May 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES, REGULATION, AND INTERPRETIVE LETTERS INVOLVED IN THE CASE

The statutory provisions involved are sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. §§ 1603(1) and 1666 (1976) (Appendix E). The regulation involved is a provision of the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.3(a) (1980) (Appendix F). This case also involves several Public Information Letters of the Federal Reserve Board (Appendix G).

STATEMENT OF THE CASE

This case concerns the relationship between the Truth-in-Lending Act and a standard practice commonly utilized in commercial credit transactions: an individual's assumption of liability for a business debt. Because the Act was designed to protect consumers who obtain credit for personal purposes, it contains a broad exemption for business credit transactions. *See* § 104(1), 15 U.S.C. § 1603(1) (1976). The decision below holds that this exemption is nullified whenever an individual is personally liable for a business debt. The Truth-in-Lending Act contains an extensive and complicated array of regulatory requirements (including those relating to disclosure, resolution of billing errors and advertising) which were not designed for and are not easily applicable in a commercial context. Because it is common for individuals to assume personal liability for business debts, especially in situations involving loans to unincorporated companies or small corporations, the Court of Appeals' decision

threatens to disrupt a broad range of commercial practices and make credit more difficult to obtain for certain business borrowers.

The facts giving rise to the litigation can be summarized briefly. A company called John E. Koerner & Co., Inc. ("the company") applied for an American Express Card on November 16, 1965. (App. C at 2c-3c.) On the same day, the company requested that company cards be issued to several employees, including Louis R. Koerner, Sr., ("Koerner"), Respondent here. For Koerner's card, both Koerner and the company signed the "Company Account" request form. By signing, Koerner agreed to be jointly and severally liable, along with the company, for all charges incurred through use of the company card issued to him. (App. A at 2a.) The company's application was approved and cards were issued to Koerner and other employees. (App. A at 2a; App. C at 3c.) All charges for use of Koerner's card, as well as the other company cards, were billed to the company at its business address on one statement. The statement showed sub-totals for each card, including the card used by Koerner. (App. A at 2a; App C at 3c.)

In 1975 a dispute arose between Koerner and American Express over the billing of certain charges. (App. A at 3a.) The parties agree that these charges were incurred for business purposes. (App. A at 3a.) The dispute had not been resolved on September 28, 1976, when Koerner attempted to use his card at New Orleans International Airport to purchase an airline ticket for a business trip. (App. A at 3a; App. C at 4c.) The ticket salesman called American Express to check the status of the account, and then (apparently at American Express' request) returned Koerner's card to him, cut in half. (App. A at 3a; App. C at 4c.)

Koerner brought suit in the United States District Court for the Eastern District of Louisiana, charging that the revocation violated section 161 of the Truth in Lending Act, 15 U.S.C. § 1666 (1976) (a section originally enacted as part of the 1974 Fair Credit Billing Act).[1] Among other things, this section prohibits certain actions by a creditor against a cardholder while the creditor is processing complaints concerning billing errors. Jurisdiction of the District Court over this claim was invoked under 15 U.S.C. § 1640(e) and its counterparts, 28 U.S.C. § 1331 and 1337. Following the recommendation of a magistrate, the District Court granted summary judgment for American Express. It held that § 161 is applicable only to extensions of consumer credit and therefore does not apply to company accounts. (App. C at 8c-9c, 17c.) It based its decision, among other factors, on the language of § 161 itself and on the exemption contained in § 104(1) of the Act for "[c]redit transactions involving extensions of credit for business or commercial purposes." (App. C at 10c, 13c.) On appeal, the Court of Appeals for the Fifth Circuit reversed.

The Court of Appeals recited the holding of the District Court but then determined that it need not resolve the question "whether § 1666 [161 of the Act] covers

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[1] Koerner also alleged that American Express violated § 127 of the Act, 15 U.S.C. § 1637 (1976), which requires certain periodic disclosures. Because Koerner asserts this section "is made applicable to American Express through § 161," his right to assert a violation of § 127 by American Express depends on the applicability of § 161. (App. A at 4a; App. C at 5c.)

In addition, Koerner alleged that American Express violated Louisiana law by committing a tort through its breach of contract. Koerner later stipulated that this claim would not reach the requisite jurisdictional amount. (App. A at 4a; App. C at 2c n.1.)

corporate transactions and transactions for business or commercial purposes." (App. A at 9a.) Instead, it decided the case on a theory not addressed by the trial court or the briefs of either party at either the trial or appellate level. The court held that because an individual is a "consumer," the creditor who accepts an individual's assumption of liability will be subject to the Truth-in-Lending Act:

> Koerner signed a statement joining in the application and assuming joint and several liability for any debts. Therefore, American Express could recover from him or from the company . . . The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer.

(App. A at 9a-10a) (footnote omitted).

In arriving at this conclusion, the Court of Appeals recognized that it was abandoning the "business purpose" test required by the language of § 104. But it deemed irrelevant the purpose of the credit transaction so long as an individual is liable for the resulting debt:

> Although our decision prevents application of the [§ 104] exemption "for business or commercial purposes" to [§ 161] when an individual is liable for debts incurred, this result is consonant with the purpose of the Fair Credit Billing Act of 1974—protecting consumers from the harassment of creditors. *See* S. Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S. Rep. No. 750, 92d Cong., 2d sess. 1-4 (1972).

(App. A at 10a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH ALL RELEVANT PRIOR JUDICIAL INTERPRETATION OF THE "BUSINESS PURPOSE" EXEMPTION, INCLUDING TWO DECISIONS OF THE TENTH CIRCUIT.

The Court of Appeals decided that the Truth-in-Lending Act applies to every extension of credit for which an individual may be liable. The decision is in direct conflict with the conclusions of every other court—including the Tenth Circuit and numerous district courts—that has previously interpreted § 104 in a case involving individual liability. The courts have consistently ruled that credit transactions for business or commercial purposes are exempt from Truth-in-Lending Act requirements regardless of who the debtor might be.[2] The court below

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[2] Two courts have ruled that § 104 does not prevent the application of §§ 132, 133, and 134 of the Act, 15 U.S.C. §§ 1642-44 (1976) (sections not at issue here), to business credit cards. *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F.2d 196 (2d Cir. 1974); *Credit Card Service Corp.* v. *FTC*, 495 F.2d 1004 (D.C. Cir. 1974). These rulings—which have since been codified by an amendment to the statute—turned on an interpretation of the particular sections at issue and are readily distinguishable. First, both cases found a conflict between § 104 and the sections at issue. Here, the court below did not resolve the issue "whether [§ 161] covers corporate transactions and transactions for business or commercial purposes." (App. A at 9a.) Thus, it could not have determined that there was a conflict between § 104 and § 161. Moreover, the express language of § 161 shows unambiguously that there is no conflict. *See* pp. 9-10 *infra*. Second, both *American Airlines* and *Remis* confirmed prior administrative interpretation of the sections at issue. Here, the position of the Federal Reserve Board's staff is that the § 104 exemption applies to the part of the Truth in Lending Act which includes § 161. *See* p. 15, *infra*.

did not cite or purport to distinguish any of those prior rulings.

The text of the Truth-in-Lending Act specifically exempts from the scope of the Act "credit transactions involving extensions of credit for business or commercial purposes." § 104(1), 15 U.S.C. § 1603(1) (1976). The exempting language is repeated in the Federal Reserve Board's implementation of the Act, Regulation Z. 12 C.F.R. § 226.3(a) (1980). The courts have previously adhered closely to this statutory and regulatory command. The Tenth Circuit recently reviewed the case law interpreting the provision and noted that "[c]ases considering whether a transaction is primarily consumer or commercial in nature look to the transaction as a whole and the purpose for which credit was extended." *Gallegos* v. *Stokes*, 593 F.2d 372, 375 (10th Cir. 1979). *See also Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975). A recent ruling by another panel of the Fifth Circuit itself is in accord: "The courts will look to the purpose of the loan to determine whether it is covered by the Act." *Poe* v. *First National Bank of DeKalb County*, 597 F.2d 895, 896 (5th Cir. 1979).[3] Numerous district courts have either expressly endorsed[4]

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[3] *Citing Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

[4] *See, e.g., Weingarten* v. *First Mortgage Co.*, 466 F. Supp. 349, 352 (E.D. Pa. 1979) ("[t]he cases which have been called to this Court's attention appear to hold without exception that where the credit transaction is for a business purpose rather than for a personal, family, household or agricultural purpose, then the transaction is not covered by the Act"); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978); *Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977), *aff'd*, 614 F.2d 968

or implictly applied[5] the same principle.

A review of these cases reveals that no court has ever before found an analysis of a transaction's purpose unnecessary because an individual consumer was liable, even where the individual consumer was arguably less sophisticated in credit transactions than the businessman plaintiff in this case. One of the two Tenth Circuit cases cited above is particularly instructive. There, the Court of Appeals reversed a trial court ruling that the Truth-in-Lending Act applied to the purchase of a pick-up truck by two Navajo Indians. The Court found that summary judgment in favor of the Indians was improper because the trial court had failed to determine whether the truck was to be used for business or for personal purposes. *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d at 234.[6]

(5th cir. 1980); *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 618-20 (D.S.C. 1974); *Adema* v. *Great N. Dev. Co.*, 374 F. Supp. 318, 319-20 (N.D. Ga. 1973); *Brill* v. *Newport Nat'l Bank*, Consumer Credit Guide (CCH) ¶ 99,057 (S.D. N.Y. 1973); *Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871, 873-74 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

[5] *See, e.g., Vines* v. *Hodges*, 422 F. Supp. 1292, 1297 (D.D.C. 1976); *Sambolin* v. *Klein Sales Co.*, 422 F. Supp. 625, 627 (S.D.N.Y. 1976); *Kenney* v. *Landis Financial Group, Inc.*, 375 F. Supp. 852, 853 (N.D. Iowa 1974.)

[6] The other Tenth Circuit case also involved the purchase of a pick-up truck. There the court affirmed a trial judge's finding of a personal purpose, following a review of that finding, where the pick-up was to be used primarily for personal transportation and where the plaintiff was "a widow with a fifth grade education, who traded her only car and personal jewelry in on [the] purchase." *Gallegos* v. *Stokes*, 593 F.2d at 375. The Fifth Circuit's *Koerner* analysis would have made the review of the lower court's determination superfluous.

See also Poe v. *First National Bank of DeKalb County*, 597 F.2d at 895.[7]

Instead of relying upon the language of the Truth-in-Lending Act and the precedent interpreting that language, the court below decided the case in accord with its own concept of equity. It held that because an individual is a "consumer", the creditor who chooses to accept an individual's assumption of liability will be subject to the Act without regard to § 104. As its colorful rule of decision, the court announced: "We base our holding primarily on a principle almost as old as flour: You cannot have your cake and eat it too." (App. A at 2a; *see also id.* at 10a.) But the court's adage does not provide a proper rule of decision. Nor is the result supported by the purposes of the Fair Credit Billing Act, cited by the court as an alternative ground for abandoning the business purpose test. If the Court of Appeals had closely examined the background of §§ 104 and 161, as the trial court did (App. C at 8c-17c), it would have found that the language, legislative history, and purposes of the Truth-in-Lending Act as a whole, and the Fair Credit Billing Act in particular, are actually fully consistent with the application of the business credit exemption.

The express language of § 161 shows unambiguously that there is no conflict between that section and § 104.

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[7] *See Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 117 (S.D. Ala. 1978) (plaintiff commercially motivated and thus not protected by the Truth-in-Lending Act where she secured credit for repairs to family home to which she intended to retire, but which she had rented out in the interim); *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 619-20 & n.6 (D.S.C. 1974) (barber earning $5,000 a year not within scope of the Truth-in-Lending Act in securing credit to purchase mobile home which he intended to rent).

Section 161 concerns billing errors in a "statement of the obligor's account in connection with an extension of *consumer credit.*" § 161(a), 15 U.S.C. § 1666(a) (1976) (emphasis added). The specific subsection of § 161 applicable to Koerner's claim below governs the closing of an "open-end *consumer credit* plan" where the obligor has given the requisite notice of an alleged billing error. § 161(d), 15 U.S.C. § 1666(d) (1976) (emphasis added). Because the references to consumer credit serve to limit the operation of 161 to non-business transactions,[8] the text of § 161 cannot be read to preclude application of the business credit exemption contained in § 104.

In addition, the legislative history of the 1974 amendments to the Truth-in-Lending Act contained in the Fair Credit Billing Act demonstrates that the "business or commercial purpose" exemption of § 104 was intended to apply to those amendments, which include § 161. The Fair Credit Billing Act was part of a bill that also included a provision excepting from § 104(1) three specific

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[8] The Truth-in-Lending Act provides that:

> [t]he adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and *the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.*

§ 103(h), 15 U.S.C. § 1602(h) (emphasis added).

According to Regulation Z:

> "Consumer credit" means credit offered or extended to a natural person, in which *the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes.* "Consumer loan" is one type of "consumer credit."

12 C.F.R. § 226.2(p) (1980) (emphasis added).

credit card provisions of the Truth-in-Lending Act: those pertaining to issuance of unsolicited cards, limits of liability, and fraud.[9] *See* 15 U.S.C. § 1645. Thus, a vehicle for making exceptions to § 104(1) was readily at hand, and was in fact utilized. Congress' failure to make use of this vehicle with respect to § 161 and the other provisions of the Fair Credit Billing amendments indicates that it intended *not* to except those provisions from the operation of § 104(1). There is also direct evidence in the legislative record that, apart from the specified exceptions, Congress intended § 104(1) to have broad application.[10]

In sum, the Court of Appeals' holding, made without benefit of review by the trial court or briefing by either

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[9] These provisions are codified at 15 U.S.C. § 1642-44 (1976).

[10] The statutory exceptions to § 104 grew out of a recommendation to Congress contained in the Federal Reserve Board's Annual Report for 1972. The Board had previously amended Regulation Z, based on its understanding of the Act, to provide the exceptions now codified at 15 U.S.C. § 1645 (1976). In the 1972 Report, it recommended that the Act be amended to conform with the Regulation and thus to provide expressly what the Board believed was previously implicit. Interpreting the amendments to the Regulation, the Board took the position that the "amendments do not affect the business exemption in its application to the disclosure, rescission and advertising requirements." 119 Cong. Rec. 4595 (1973). *See also* 37 Fed. Reg. 24337, 24339 (1972) (promulgation of amended regulations); 37 Fed. Reg. 16408 (1972) (proposal to promulgate amended regulations). Thus, it intended the statutory amendments to have a similar limited effect. *See* 1972 Annual Report, *supra*, 119 Cong. Rec. at 4597. There is every indication that Congress agreed with the Board, for the Annual Report was included in the record at the time Senator Proxmire introduced the bill incorporating the Board's recommendation. 119 Cong. Rec. 4595 (1973).

party, is without support.[11] It nonetheless exists as a basis for universal abandonment of the well-established business purpose test as a measure of the scope of the Truth-in-Lending Act. Certiorari should be granted to resolve the direct conflict between this new ruling and earlier decisions which treat the purpose of the credit transaction as dispositive under § 104.

II. THE COURT OF APPEALS VIOLATED THE RECENT EXPRESS HOLDING OF THIS COURT IN *FORD MOTOR CREDIT COMPANY* v. *MILHOLLIN* BY DISREGARDING FEDERAL RESERVE BOARD STAFF OPINIONS ESTABLISHING THAT CREDIT TRANSACTIONS FOR BUSINESS OR COMMERCIAL PURPOSES ARE EXEMPT FROM THE TRUTH-IN-LENDING ACT, REGARDLESS OF WHO THE DEBTOR MIGHT BE.

In *Ford Motor Credit Co.* v. *Milhollin*, 100 S. Ct. 790 (1980), this Court held that the courts' "traditional acquiescence in administrative expertise is particularly apt" where the Federal Reserve Board and its staff interpret the Truth-in-Lending Act. *Id.* at 797. "Congress has specifically designated the . . . Board and [its] staff as the primary source for interpretation and appli-

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[11] The court's reliance on the ground that an "individual" or, as it occasionally put it, a "consumer," was liable on the debt would actually make part of § 104(1) meaningless. That section exempts from the scope of the Truth-in-Lending Act extensions of credit "to government or governmental agencies or instrumentalities, or to organizations." 15 U.S.C. § 1603(1) (1976). "Organization" is defined as a "corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1602(c) (1976). Therefore, as the Act now stands, *only* extensions of debt to "individuals" are within the scope of the Act. The court therefore makes the "business purpose" exemption surplusage, since it would only exempt transactions already exempted by another portion of § 104.

cation of truth in lending law[s]." *Id.*[12] Accordingly, the Court held that where the interpretation of the Act or Regulation Z is at issue,

> [u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . .

Id. Under the *Milhollin* rule, it was the duty of the Court of Appeals to inquire whether there was a rational basis to support applicable rulings of the Federal Reserve Board staff. The Court conducted no such inquiry.

The Federal Reserve Board staff has determined repeatedly that a transaction involving an extension of credit for business or commercial purposes is exempt from the operation of the Truth-in-Lending Act, whether or not an individual is liable for the obligation. In one opinion letter directly on point, the staff ruled that the Truth-in-Lending Act would not apply where a corporation and a corporate employee are jointly and severally liable for obligations incurred on the employee's credit card, issued to the corporation for use by the employee. The staff stated that "[i]f the credit is for business or commercial purposes, it would not be subject to Truth in Lending by virtue of the exemption in § 226.3(a)."[13]

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[12] *See also Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973).

[13] The staff went on to note that "if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to Truth in Lending's provisions. However, we suspect that few cards, if any, which are issued with a corporation as a cardholder would fall within this category." Thus, where an issue arises concerning the purpose for which a corporate employee's

Public Information Letter No. 727, November 13, 1975, issued by Griffith L. Garwood.

Other staff opinions reach identical conclusions. The staff has advised that where a corporation's principal shareholder guarantees a loan made to the corporation for a business purpose, and provides his principal residence as security for the loan, the transaction is exempt from the Truth-in-Lending Act because of the business purpose exemption. Public Information Letter No. 277, March 10, 1970, issued by Kenneth A. Kenyon.[14] The staff has also determined that where credit is extended to an individual who buys securities to supplement his business income as a merchant, the transaction is exempt

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company credit card is used, the staff has determined that it will be deemed used for business or commercial purposes unless it is used "*primarily* for personal, family, household or agricultural purposes."

The staff's position finds support in the statutory definition of "consumer" and the definition of "consumer credit" contained in Regulation Z, both of which define a consumer credit transaction as one *primarily* for "personal, family household, or agricultural purposes." *See* n.8, *supra*. Courts have indicated that transactions falling outside this definition must be business credit transactions exempted from the coverage of the Act. *See, e.g., Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

[14] *See also* Public Information Letter No. 751, January 14, 1974, issued by Jerauld C. Kluckman (loan taken by individual exclusively for business purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan will be secured by private home); Public Information Letter No. 663, January 23, 1973, issued by Jerauld C. Kluckman (loan transaction for commercial purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan is secured by antiques used for personal, family, or household purposes).

from coverage, even though the only obligor is a natural person. Public Information Letter No. 821, July 18, 1974, issued by Jerauld C. Kluckman.

The Board staff has also specifically ruled that the business purpose exemption is fully applicable to the amendments to the Truth-in-Lending Act contained in the Fair Credit Billing Act. This includes § 161. In a letter cited but ignored below, the staff responded to an inquiry concerning the applicability of the Fair Credit Billing requirements to "cards . . . used by corporate employees to purchase goods or service required for the performance of their job." The staff took the position that "the requirements of Fair Credit Billing do not apply to card issuers in relation to card holders using the cards for business or commercial purposes." Public Information Letter No. 1004, February 10, 1976, issued by D. Edwin Schmelzer.

Under the rule established by this Court in *Milhollin*, positions of the Federal Reserve Board staff should be dispositive, "[u]nless demonstrably irrational," where interpretations of the Truth-in-Lending Act and Regulation Z are at issue. The Board staff has consistently taken the position that credit transactions for a business or commercial purpose are exempt from the coverage of the Act, even if an individual executes or guarantees the loan obligation. It has also determined that this exemption is applicable to that part of the Truth-in-Lending Act which contains § 161. These positions are not irrational, for they find support in the express language and legislative history of the Act and Regulation Z and in the cases interpreting the Act and Regulation.[15]

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[15] The staff's position that credit transactions for a business or commercial purpose are exempt from the coverage of the Truth-in-Lending Act finds support in the express language establishing the exemption, contained in the Act and Regulation Z, *see* p. 7 *supra*, and in the cases cited above

The Court of Appeals cited *Milhollin* and announced that it would give the staff's opinion "great weight." (App. A at 8a.) But it did not purport to analyze the relevant staff opinions or to reject them on the ground that they lacked a rational basis. Instead, it ignored the *Milhollin* test and substituted its own fiat for the Board's well-considered approach.

III. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON CREDIT FOR BUSINESS ENTERPRISES.

The Court of Appeals' ruling that a debtor's status as an individual forces application of the Truth-in-Lending Act to commercial credit transactions has serious consequences for business enterprises, particularly small and new businesses.

Frequently, unincorporated businesses can obtain credit only if the individual or individuals running the business assume personal liability for the loan obligation. Even for incorporated businesses, small businesses or new businesses with a limited financial history can often obtain credit in adequate amounts and at acceptable rates of interest only if the individuals behind the corporate facade assume liability for the corporate debt: [16]

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interpreting that language. *See* pp. 7-9, *supra*. The staff's position that the business purpose exemption is applicable to the Fair Credit Billing Act, which includes § 161, is fully supported by the express language of § 161, *see* pp. 9-10 *supra*, and by the legislative history of the Fair Credit Billing Act. *See* pp. 10-11 *supra*.

[16] The guaranty is a particularly common way of structuring the individual's liability for corporate debt:

> A great many bank loans would be unjustified from a credit point of view without the support of a guaranty. As a result, it is common practice for a bank, when mak-

> Before agreeing to make a loan, a bank will often require the added liability of a third party as security for the borrower's performance. This type of transaction is routine whenever the borrower's own financial position fails to justify the loan and whenever, in loans made to corporations, the bank or other lender wishes to obtain the liability of officers or stockholders who, if the corporation should default, would not otherwise be obliged to pay the note.

W. Hawkland, Commercial Paper 92 (2d ed. 1979).

Moreover, the practice of obtaining a personal guarantee or other personal liability has commercial utility beyond the new or weak business enterprise. From the standpoint of the lender, individual liability—whatever its form—functions to improve the security of the business debt. From the standpoint of even a large corporate borrower, the individual's agreement to assume liability acts as a form of constraint upon abuse by that individual or others under his supervision. In these and numerous other ways, the practice of individuals assuming liability in commercial credit transactions affects the availability, cost and desirability of the credit transaction for the business parties.

Under these circumstances, the decision of the Court of Appeals has pernicious effects. The Truth-in-Lending Act and Regulation Z include a detailed regulatory scheme which mandates specific disclosures, provides for rights of rescission, imposes limitations on advertising, and otherwise governs the transactions themselves. If lenders continue to demand individual guarantees or other forms of personal liability, borrowers will be charged the costs of compliance with the Act and Regulation, and the com-

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> ing a loan to a small corporation, to insist on guaranty forms *signed* by individuals—and other corporations—with ownership interest in the borrower.

T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 3-416[A][5] (Supp. 1979).

mercial transactions themselves will be needlessly burdened by complicated regulatory requirements not designed for such transactions. If lenders choose to forego the personal liability, this may result in the unavailability of funds, a higher cost to borrowers, or other social costs which business enterprises are unwilling to accept. In either event, the imposition of the Truth-in-Lending requirements upon standard commercial transactions creates new and significant economic constraints.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

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